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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

While we have little to add to our opening brief respecting respondent's arguments, the quite different contentions now advanced by the AFL-CIO as *amicus curiae* require further elaboration of our views. Accordingly, in this reply we first comment briefly upon respondent's analysis and then show that the position

taken by the *amicus,* which is foreign both to the position taken throughout this litigation by the respondent and to the rationale adopted by the lower court, is without merit.

1. *The positions of the parties.* In view of the marked differences between the approach of the respondent and that of the *amicus curiae,* we start by outlining the positions of the respective parties.

No one denies that, for purposes of the issue presented here, it must be assumed *arguendo* that the union violated Section 2 First of the Railway Labor Act. Where that is so—where, for example, the union simply refuses to engage in any discussion of the issues, believing that a strike will so cripple the carrier that unconditional surrender will be the result—it is our view that judicial relief is available to the carrier, because the Congress intended by Section 2 First to impose a legally enforceable obligation "to exert every reasonable effort" to negotiate an agreement. Moreover, we urge that the Norris-LaGuardia Act does not place strike injunctions outside the scope of available relief, because the Congress did not intend Norris-LaGuardia to touch situations in which a party has transgressed the Railway Labor Act (Br. 24-25).

Respondent, on the other hand, denies that the Congress intended Section 2 First to be judicially enforceable under any circumstances. No matter how palpable the violation and how destructive the consequences, in respondent's view the courts are powerless to intervene at any stage with any form of relief. But respondent evidently does not disagree with our view respecting the reach of Norris-LaGuardia, a statute that is not once even cited by respondent. Thus

the parties to this litigation—both members of what the *amicus* refers to in often-cited terms as a " 'state within a state . . . [having] its own customs and its own vocabulary' " (Br. p. 1)—apparently agree that this case turns upon the question whether the Congress intended violations of Section 2 First to be justiciable *at all.*

The *amicus,* in contrast, evidently is not prepared to maintain that a claim of a violation of Section 2 First is not justiciable, but argues instead that strike injunctions are foreclosed by Norris-LaGuardia. To be sure, the *amicus* says that it "agree[s] fully with" respondent's contentions and that it is simply "assum[ing] *arguendo*" that they are wrong (Br. pp. 3-4 & n.1). But the force of that commitment to respondent's position is undermined by the *amicus'* view of *Virginian,* which corresponds with ours:

> "That assumption [that the courts can enforce the duty to bargain in good faith] does entail the conclusion that some form of injunctive relief is available to require a party, which has failed to meet this obligation, to negotiate properly. *That is the lesson of Virginian Ry.* v. *Systems Federation,* 300 U.S. 515, 544-550 (1937), *where this Court held that a refusal to treat could be remedied by an order requiring 'the employer to meet and confer . . . to listen to* [*his employees*] *complaints, to make reasonable effort to compose differences . . .'* " (Br. p. 4) (emphasis supplied).

2. *The arguments of respondent.* For the most part, we rely upon our opening brief with respect to respondent's arguments. We add only the following observations:

a. As to the legislative history of Section 2 First, respondent speaks hardly at all. Respondent simply

declares that "Mr. Richberg's conception of the extent to which Section 2, First, might be judicially enforceable was only to compel a railroad to deal with the representative freely selected by its employees" (Br. p. 16).[1] But respondent does not point to any language to support this notion that Mr. Richberg thought Section 2 First would be enforceable only against carriers, and neither the testimony reproduced in our brief (pp. 35-38) nor that in respondent's brief will bear such a restrictive reading. Accordingly, there is no basis whatever for ascribing to the Congress an intent that an obligation in terms applicable to both parties should in fact bind only one.[1a] As this Court has repeatedly declared, the obligations imposed by the Act are mutual and the "Act's command [is] that *employees as well as railroads* exert every reasonable effort to settle all disputes." *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960). See also, *e.g.*, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 721 n. 12 (1945); *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 151 (1969); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961).

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[1] Respondent's attempt to explain away Mr. Richberg's remarks cannot in any event support its main argument that Section 2 first is not justiciable at all.

[1a] The *amicus* takes a different approach to this legislative history. The *amicus* does not deny that it discloses an intent that Section 2 First be enforced, if necessary, by the courts. But the *amicus* says, as we understand it (Br. pp. 17-18), that the debates do not reflect explicitly an intent that the provision be enforced by strike injunctions. But of course in 1926, prior to enactment of the Norris-LaGuardia Act, there was no occasion for the legislators or witnesses to discriminate among various types of enforcement. If a provision of this sort was enforceable, then in an appropriate case a strike injunction would have been available.

b. As to this Court's prior opinions, we merely sketch our approach and identify the fundamental flaw of respondent's. Broadly stated, our view of this Court's decisions is as follows: (1) The principles this Court applied in *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925), in holding Section 301 of the Transportation Act of 1920 unenforceable were held inapplicable to the Railway Labor Act in *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930). (2) The *Texas & N.O.* view that the Railway Labor Act imposed certain enforceable obligations led in *Virginian* to a holding that Section 2 First is enforceable. (3) That holding was not overturned by *General Committee* v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943), which simply held that the Congress in Section 2 Ninth had evinced an intent that representational disputes not be dealt with by the courts and that the more general terms of Section 2 First do not override the more specific legislative plan for this special sort of problem. And (4) all subsequent expressions by this Court, including in particular the very explicit statement respecting Section 2 First's requirement of "[g]ood faith," "not merely perfunctory," "exhaustion of the possibility of agreement" in *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), confirm our reading of *Virginian* and its continued vitality.

The basic error in respondent's analysis of this Court's decisions is respondent's view—a view not anchored in anything in this Court's opinion in *Virginian*—that *Virginian* did not hold Section 2 First judicially enforceable (Br. pp. 16-18, 22). Having eliminated from consideration the principal relevant decision, respondent relies mainly upon the old *Penn-*

sylvania R.R. System Federation decision and *Missouri-K.-T. R.R.*, and asserts in substance that this Court could not have meant what it said in *Burley* (Br. pp. 12-13, 19-22). Even without *Virginian*, respondent's analysis would be defective. The *Burley* statement cannot be ignored; *Pennsylvania* is clearly without precedential value in view of *Texas & N.O.*; and *Missouri-K.-T. R.R.* is not in point for the reasons we have already discussed. And when *Virginian* is accorded its proper place in the chain of relevant decisions, respondent's analysis collapses entirely.[2]

c. As to the lower court decisions discussed in our opening brief, respondent limits its reply to an assertion that none involved a holding respecting the justiciability of Section 2 First, together with an incorporation by reference of its Brief in Opposition (Br. p. 38). Respondent's reading of these decisions is just incorrect. Because of the significance of the long established understanding that Section 2 First is judicially enforceable, we described these lower court cases at some length (Br. pp. 61-68). Those descriptions, which identify with precision the character of the courts' treatment of Section 2 First, are in our view entirely accurate. Since respondent does not take issue with our analysis with any specificity, we are not called upon to supplement it. We note only that

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[2] In connection with the litigation that ended in *Brotherhood of Locomotive Eng'rs* v. *Baltimore & Ohio R.R.*, 372 U.S. 284 (1963), respondent notes (Br. pp. 23-24) that the railroads, in their brief to the Court of Appeals, contended that the union's claim should be denied because Section 2 First, upon which that claim was based, was not justiciable. But both the lower courts and this Court passed on the claim on the merits. Surely it is much more relevant that the non-justiciability argument was unsuccessful than that the railroads advanced it.

respondent's reliance (Br. pp. 18-19) upon *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967), is quite inexplicable, since in that case the Court of Appeals affirmed a Section 2 First strike injunction, as we noted in our opening brief (pp. 63-64).

d. As to the role of the National Mediation Board, respondent is silent with respect to our discussion of the relevant legislative history (Br. pp. 37-42), the relevant judicial precedent (Br. pp. 71-73), and the materials disclosing the Board's own practice (Br. pp. 73-78).[3] And as to our demonstration that in crucial respects the Board would be powerless to induce good faith bargaining (Br. pp. 45-47), respondent's answer is simply that "if that is so, then the remedy is for Congress by amendment of the Railway Labor Act and not for the Courts. . . ." (Br. p. 42). But this of course misses the point. If the Congress intended Section 2 First to impose enforceable obligations, it is most improbable that it would have en-

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[3] A possible exception is respondent's observation (p. 41) that in the case at bar the letter from the Board advising the parties that it was closing its file contained the following passage:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement" (A. 199).

But that statement accords precisely with our view of the Board's statutory responsibility. As we have pointed out, "Section 5 directs the Board to exercise *its* 'best efforts' to bring about a settlement, but does not speak in terms of the Board's compelling the parties to exercise *their* best efforts or deciding whether or not they have" (Br. p. 33). And so in the case at bar the Board terminated its services when it was satisfied, as it put it, that "all practical methods . . . for *our* adjusting the dispute have been exhausted" (emphasis supplied).

trusted enforcement to an agency that is institutionally incapable of securing full compliance.

3. *The argument of the amicus curiae.* The general features of the argument of the *amicus curiae* seem to us to be these: (a) While this Court has ruled that the Norris-LaGuardia Act does not preclude injunctions against strikes in "minor disputes," and while it may be that strike injunctions could properly issue to secure compliance with some of the "major dispute" requirements of the Railway Labor Act, this Court's decisions do not require the conclusion that Norris-LaGuardia is inapplicable where the strike injunction is sought upon the basis of a violation of Section 2 First. (b) Accordingly, as to this issue that is still open, the Court should balance the interests protected by the Railway Labor Act with those protected by the Norris-LaGuardia Act in much the fashion that this Court dealt with the issue presented last Term under the Labor Management Relations Act in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970). And (c), the result of such a balancing of competing policy considerations, taking into account the various relevant circumstances affecting collective bargaining and the exercise of economic force through strikes, should be the affirmation of the applicability of the Norris-LaGuardia Act to strike injunction claims bottomed upon violations of Section 2 First.

As we now show, this argument is deficient in all its major elements. Whatever the relevance of the policy considerations advanced by the *amicus* in a case involving an apparent conflict between the Labor Management Relations Act and the Norris-LaGuardia Act, neither these considerations—nor opposing policy considerations—are material in a suit involving a claim

that a "major dsputes" requirement of the Railway Labor Act has been breached. While this Court has not, of course, decided the precise issue before it in this case, this is the clear teaching of its opinions dealing with the inter-relationship of the Railway Labor Act and the Norris-LaGuardia Act. Moreover, even if questions respecting the relationship between the Railway Labor Act and the Norris-LaGuardia Act were to be approached in the same fashion as the question in *Boys Markets,* the appropriate balancing of policy considerations in the case at bar should lead to the same result that was reached in *Boys Markets* —namely, that Norris-LaGuardia is inapplicable.

a. Since the *amicus* draws so heavily upon the provisions of, and the practices and decisions under, the Labor Management Relations Act, we note preliminarily our agreement with respondent (Br. p. 31) as to the validity and importance of this Court's observation that the

> ". . . National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 383 (1969) (footnote omitted).

This Court struck the same note of caution in its principal decision respecting the relationship of the Norris-LaGuardia Act to cases involving strikes in violation of the Railway Labor Act:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis

of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. § 151 *et seq.* It is one of those differences which underlies the controversy in this case." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R. R.*, 353 U.S. 30, 31 n. 2 (1957).

More particularly, a "fundamental premise and principle"—though of course not the only premise and principle—of the Railway Labor Act was to prevent strikes in this vital industry. As this Court has said, "[T]he major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 565 (1930). "[T]he Act's primary objective" is "the prevention of strikes." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 154 (1969). To this end, "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 374 U.S. 238, 246 (1966). Or, as this Court put it last Term, "A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S., at 149 (1969). None of this, of course, can be said of the Labor Management Relations Act, which does not require "purposely long and drawn out procedures" for negotiations during which strikes are prohibited.[4]

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[4] See, *e.g.*, *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960); *International Union, UMW* v. *NLRB*, 257 F.2d 211, 215 (D.C.Cir. 1958); *Textile Workers Union* v. *NLRB*, 227 F.2d 409, 410 (D.C.Cir. 1955).

b. For these reasons, the Norris-LaGuardia inquiry in this case should begin with a consideration of the Congressionally intended relationship between the Norris-LaGuardia and the Railway Labor Acts, rather than with an effort to construct the sort of "rough analogies" to the Labor Management Relations Act that "must be drawn circumspectly," as this Court put it in the *Jacksonville Terminal* case, *supra*. This Court has upon a number of occasions considered that relationship. The principle established by this Court's decisions, as we said in our opening brief (pp. 24-25), is that the Norris-LaGuardia Act was not intended to apply to suits grounded upon alleged violations of the Railway Labor Act. The *amicus*, however, faults our analysis as clothed by "rhetoric" that was "carefully designed" to "allow evasion" of the Norris-LaGuardia issue—an issue raised for the first time in this litigation by the *amicus*. Accordingly, we now describe more fully the bases for our position.

The first relevant decision by this Court was *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 562-563 (1937), where this Court rejected a contention that the injunctive decree against the carrier was invalid "for its failure to conform to the requirements of § 9 of the Norris-LaGuardia Act." The basis for this conclusion was the fact that the carrier had violated the Railway Labor Act:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

Next, in *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232, 237 (1949), this Court, in upholding an injunction enforcing the Act's requirement of non-discriminatory representation by unions, rejected a Norris-LaGuardia defense on the ground that that Act "did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act." This decision was followed in a similar case, *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952), where this Court held that "the District Court has jurisdiction and power to issue necessary injunctive orders" "notwithstanding the provisions of the Norris-LaGuardia Act."

It is true, as the *amicus* notes (Br. p. 18), that none of these cases dealt with an anti-strike injunction. But respondent points to nothing in the text of the statutes, in their legislative history, or in these opinions that would support the notion that some provisions of the Norris-LaGuardia Act—such as Sections 7 and 9, 29 U.S.C. §§ 107, 109, governing the procedure to be followed in issuing "labor dispute" injunctions —may be dispensed with in the interests of compelling compliance with the Railway Labor Act, but not the Section 4 ban against strike injunctions, 29 U.S.C. § 104. The rationale of these opinions is simply, as phrased in *Graham,* that Norris-LaGuardia "did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act."

After *Howard,* the question of the relationship of the Norris-LaGuardia Act to the Railway Labor Act was carefully explored in a strike injunction context in *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R. R.,* 353 U.S. 30 (1957). There the Court first con-

cluded that the "minor disputes" provisions of the Railway Labor Act were intended to foreclose strikes over such disputes, though the statute did not say so explicitly. Then the Court held that in those circumstances Norris-LaGuardia did not bar an injunction. In support of that determination, the Court pointed to the legislative history of the Norris-LaGuardia Act, which reflected a recognition "that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them." *Id.* at 41. The Court also relied upon the prior decisions discussed above, describing them as cases in which "this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act" and in which "the Court held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." *Id.* at 41-42. And the Court regarded as "inapposite" decisions applying Norris-LaGuardia where the union's conduct was "unlawful under some other statute," since the Railway Labor Act, as well as the Norris-LaGuardia Act, was "adopted as a part of a pattern of labor legislation." *Id.* at 42.

While *Chicago River* involved a "minor dispute," the principles there applied are equally applicable to "major disputes." As this Court has declared, the legislative purpose reflected in the Railway Labor Act to ban strikes until the "major disputes" requirements of the Act are met is clear—just as clear, surely, as the purpose to ban strikes over "minor disputes." "[W]hile the [major] dispute is working its way through these stages, neither party may unilaterally alter the status quo." *Brotherhood of R.R. Trainmen*

v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). The "immediate effect" of the "status quo requirement"—which includes "the implicit status quo requirement in the obligation imposed by § 2 First"—"is to prevent the union from striking"; this is "the Act's primary objective"-"the prevention of strikes." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 150, 154 (1969). And precisely the same legislative history that supported this Court's conclusion in *Chicago River* respecting the permissibility of strike injunctions designed to "vindicate the processes of the Railway Labor Act" respecting "minor disputes" supports that same conclusion respecting the "major dispute" statutory requirements. The fact of the matter is that the Congress, in enacting Norris-LaGuardia, simply did not intend to trench upon enforcement of the Railway Labor Act. That is why, for example, Congressman LaGuardia declared that the bill "in no way repeals the railroad labor act"; and that the bill would not "make it possible for lack of an injunction to tie up railroads" because "in 1926" "[w]e then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads," so that "[t]hey could not possibly come under this for the reason that we provided the machinery there for settling labor disputes"; and that citation of a railroad injunction case by opponents of the bill was "beside the point now, because that case would come in under the railroad labor act"; and that "the railroad workers could not and would not think of going on strike before all the remedies provided in the [Railway Labor Act] law have been exhausted"; and that "[i]f the railroads have complied, they would not, as has been suggested,

be deprived of any relief which they may have in law or equity."[5]

Because of these considerations, as we pointed out in our opening brief (pp. 24-25), the lower courts in

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[5] In fuller text, Congressman LaGuardia's remarks in the House debates on the bill were as follows:

To allay the fear of the chief opponent of the bill, Congressman Beck, Mr. LaGuardia said:

> "The bill, I will say to the gentleman from Pennsylvania, in no way repeals the railroad labor act, and three-fourths of the argument of the gentleman from Pennsylvania was directed against interference with transportation in interstate commerce; and the gentleman is a sufficiently good lawyer to know the provisions of the railroad labor act, which was passed in 1926.
>
> "Was it to create fear; was it to create prejudice? I will not charge that to the gentleman from Pennsylvania; but it was most unbecoming for a lawyer of his standing to direct his fire entirely on the interruption of transportation of interstate traffic, when there is another law which will take care of that situation.
>
> "Gentlemen, this bill does not—and I can not repeat it too many times—this bill does not prevent the court from restraining any unlawful act. This bill does prevent the Federal court from being used as an agency for strike-breaking purposes and as an employment agent for scabs to break a lawful strike. [Applause.] That is what the bill does." 75 *Cong. Rec.* 5478 (1932).

On the subject of the federal government's obtaining an injunction in the celebrated shopman's strike of 1922, Mr. LaGuardia stated:

> "But even that case is beside the point now, because that case would come in under the railroad labor act, which provides mediation and conciliation, which appoints a board of mediation, and the whole procedure of settlement of disputes is outlined in detail in that act." *Id.* at 5479.

Congressman Lankford then asked if the bill would prevent injunctions against railroad strikes, and Mr. LaGuardia said no:

> "Will the gentleman answer this question? Does this make

a long and unbroken line of cases subsequent to *Chicago River* have held that, notwithstanding Norris-LaGuardia, strike injunctions may be granted where the

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it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?

"MR. LAGUARDIA. I think the gentleman was a Member of the House in 1926?

"MR. LANKFORD of Virginia. No.

"MR. LAGUARDIA. We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.

". . . .

"MR. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?

"MR. LAGUARDIA. Interstate traffic is entirely covered in the railroad labor act of 1926." *Id.* at 5499.

Finally, Congressman Beck offered an amendment to the bill to exempt public utilities from the anti-injunction provisions. The amendment was defeated, with Mr. LaGuardia arguing against it on the ground that the Railway Labor Act made it unnecessary:

"MR. LAGUARDIA. Mr. Chairman, I rise in opposition to the amendment offered by the gentleman from Pennsylvania.

"I just want to call attention to the railroad labor act of 1926, which provides in the very beginning of the act:

"[Here was quoted Sections 2 First through Fourth] . . . .

"Mr. Chairman, the law provides every detail for the settlement of disputes. Then, if all direct negotiations fail, the law establishes and maintains a permanent board of mediation. Now, in section 8 of this bill it is provided:

'No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.'

"So that there is the tie-up between the provisions of the railroad labor act and the necessity of exhausting every rem-

union has not complied with the "major disputes" requirements of the Act. Moreover, these courts' view of *Chicago River* corresponds entirely with this Court's discussion of that opinion in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960). In

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edy to adjust any difference which might arise. The workers could not and would not think of going on strike before all the remedies provided in the law have been exhausted. If the railroads have complied, they would not, as has been suggested, be deprived of any relief which they may have in law or equity.

"I submit that the amendment is not at all necessary." *Id.* at 5504.

In the Senate debates Senator Steiwer of Oregon asked whether the bill might act to bar injunctive relief sought by unions against the railroads, as in the *Texas & N.O.* case. Senator Blaine, one of the leading spokesmen for the bill, explained that the bill would not bar injunctive relief sought "with respect to the substantive law written into the railway labor act":

"MR. BLAINE. It is a very simple case—the Texas case involving the railroad clerks. They have certain rights under substantive law; these rights can be enforced only through an equity proceeding; and there is no penalty imposed by the railway labor act against the violation of the provision I just read, and that is the only provision that is of any great consequence, at least in this discussion. There is no remedy by which the employees may recover damages; the only remedy they have is by injunctive process; and they would allege that there is no remedy at law. To me it seems very clear that the subject the Senator is discussing is entirely separate and apart from the railway labor act. I can not see how it is applicable to this proposed act.

". . . .

"MR. BLAINE. Mr. President, I have concluded my statement, and I am quite sure that there is no logical argument by which the Senator from Oregon can construe the provisions of section 6 to deny the working men any rights they may have under any substantive law, either statutory or court-made; certainly not with respect to the substantive law written into the railway labor act." 75 *Cong. Rec.* 4937-38 (1932).

that "major dispute" case, this Court held that Norris-LaGuardia precluded a strike injunction because the union *had* complied with the Railway Labor Act—in particular, with Section 2 First.[6] For this reason, the Court explained, *Chicago River* was not in point, for there the Court had

> "held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act 'adopted as a part of a pattern of labor legislation.' 353 U.S. 30, 42. The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute [footnote omitted]. *Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules and working conditions.'* 45 U.S.C. § 152, First." *Id.* at 339 (emphasis supplied).

The opinion of the four dissenting Justices, moreover, rested upon the same view of *Chicago River*—that Norris-LaGuardia does not bar injunctions against strikes where the union has not complied with the Railway Labor Act. The dissenting Justices parted from the majority with respect to the question whether the union's demand was a legitimate subject of mandatory bargaining—the question, that is, whether the

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[6] For another decision applying Norris-LaGuardia in a "major dispute" where there had been no violation of the Railway Labor Act, see *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944).

union had in fact complied with the Railway Labor Act. As to Norris-LaGuardia, the dissenters said:

> ". . . This Court has consistently held that the Norris-LaGuardia Act does not prevent a federal court from enjoining an unlawful abuse of power conferred upon a labor union by the Railway Labor Act or a threatened strike to force acceptance of an unlawful demand.
>
> . . . . .
>
> "There [in *Chicago River*], as here, the union's demand was in derogation of the specific provisions of an Act of Congress, and here, as there, those specific provisions must 'take precedence over the more general provisions of the Norris-LaGuardia Act.'" *Id.* at 360, 361.

It was for these reasons, and upon the basis of these authorities, that in our opening brief (pp. 24-25) we asserted that, if the Congress intended that Section 2 First impose judicially enforceable obligations, the Norris-LaGuardia Act would not stand in the way of a strike injunction. Our point, in sum, is this: Section 2 First adds a substantive, legally enforceable obligation to the formal obligations of notices, conferences, and mediation imposed by other provisions of the Railway Labor Act. Under that Act the union's right to strike does not ripen until that substantive obligation is met. That being so, this Court's decisions respecting the relationship between the Norris-LaGuardia and Railway Labor Acts, as well as the legislative history of the Norris-LaGuardia Act, establish that the courts may enjoin a strike called prior to discharge of this obligation.

c. The *amicus* pays little heed to these considerations of dominant importance with respect to the relationship between the Railway Labor and Norris-LaGuardia

Acts. The *amicus* concedes, at least *arguendo,* that the Congress did intend Section 2 First to impose a legally enforceable obligation upon the parties to bargain in good faith while exhausting the major disputes procedures of the Railway Labor Act (Br. p. 17). The *amicus* does not question that, despite Norris-LaGuardia, strike injunctions may issue where the union has violated other major disputes requirements of the Railway Labor Act (Br. pp. 12-15). Nevertheless, the *amicus* contends that Norris-LaGuardia should be read to bar strike injunctions where the union has violated Section 2 First. But the *amicus* points to no statutory language, no legislative history, and no precedent in support of this proposed exception to the general rule respecting the interrelationship of these two statutes. Given the central importance of Section 2 First in the statutory scheme, it is hardly surprising that there is no basis in the relevant materials for inferring a legislative purpose to immunize from injunctive relief this single class of violations of the Railway Labor Act.

d. What the *amicus* does say, as we read its brief, is that on broad policy grounds having to do with the respective impact upon unions and employers of elimination of strike injunctions in this type of case, such injunctions should be barred in all circumstances. For the reasons we have stated, the intent of the Congress is quite clear enough to foreclose this sort of speculative inquiry. The Congress has struck the balance between competing policy considerations, whether wisely or not. But in any event, the *amicus'* points are not well taken.

(1) First, the *amicus* says that where the union does not comply with Section 2 First "an injunction

requiring good faith bargaining" "'can effectively guard the plaintiff's right'" (Br. p. 17). The *amicus* evidently recognizes that a suit for such an injunction would be of little utility unless brought well in advance of the expiration of the relevant "cooling off" period so that an injunction could be secured and enforced in sufficient time for an agreement to result from good faith bargaining before a strike. For the *amicus* suggests that such an injunction should be sought "expeditiously prior to the time self help is permissible" (*ibid.*). But this suggestion ignores the realities of collective bargaining under the Railway Labor Act. Because of those realities, such an injunction suit would not afford a practical remedy. Moreover, the institution of such suits would undermine, rather than secure, the aim of peaceful resolution of disputes. These would be the consequences for the following reasons:

In the first place, suits brought early enough for relief to be effective would generally be too early for relief to be granted. Where bad faith bargaining is not manifested, or does not occur, until the late stages of negotiation, this would obviously be true. But it would likely be true even where there are early signs of bad faith bargaining. It is a commonplace, as the *amicus* recognizes (Br. p. 14), that in important railway labor disputes bargaining is likely to become more intensive as the various "cooling off" periods run their course. Unreasonable and seemingly intractable demands are often dropped during the protracted proceedings of the Act. In such circumstances, where the claim hinges upon "the entire course of the negotiations," as the *amicus* characterizes bad faith bargaining claims (Br. p. 5), a carrier would be hard pressed to make out a case at the initial, rather than

the terminal, stages of the fixed statutory periods. That is why, in a case in which a carrier sought the sort of relief recommended here by the *amicus,* the court dismissed the case as premature:

> ". . . It is the philosophy of the Act that discussion, bargaining and mediation will dissipate many problems. If these four proposals are as meritless as they appear to plaintiffs to be, they may well topple of their own weight in the light of further discussion in the mediation process. Furthermore, as counsel for defendants argue, said proposals may be modified, or even withdrawn. Failing all of this, and should defendant Brotherhoods persist in their insistence upon discussing said proposals, and should plaintiffs' worst fears materialize and a strike become imminent, it may be that plaintiffs may then seek an injunction if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith. . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.,* 223 F.Supp. 296, 307-308 (M.D.Ga. 1962), *aff'd on basis of opinion below,* 324 F.2d 503 (5th Cir. 1963).

Moreover, the institution of such litigation, especially since it involves allegations of bad faith, would impede the development of the collaborative efforts necessary to settle disputes. This Court identified this problem last Term in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 248 (1970), in rejecting the same sort of argument advanced in that case by the *amicus.* There, in urging the applicability of Norris-LaGuardia to a strike injunction sought to enforce a no-strike contractual clause, the *amicus* pointed to alternative remedies such as damages and employee discipline.[7]

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[7] Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, pp. 26-32.

This Court's response is as relevant here as in *Boys Market:*

> "While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. *Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." Id.* at 248 (emphasis supplied; footnote omitted).

Similarly, in *International Ass'n of Machinists* v. *NMB,* 425 F.2d 527, 542 (D.C. Cir. 1970), the court observed:

> "The mediation conducted after filing of the complaint under the shadow of litigation overhanging the Mediation Board is not the kind of mediation envisaged by Congress in § 5 of the Act. Its failure or inconclusiveness does not demonstrate similar lack of success for a mediation process conducted without the artificial pressure and distortion of an overhanging litigation. A party that brings a court action may well acquire a stake in showing that mediation won't work."

In short, the availability of strike injunctions in cases where the union has violated Section 2 First *is* necessary to enforce the Railway Labor Act.

(2) Another major element of the *amicus'* analysis is rooted in the prediction that the courts will frequently err in judging bad faith bargaining claims because the issue is complex. The *amicus* apparently recognizes that such a contention does not advance its case unless the expected error will tend to favor car-

riers more often than unions. But it will, the *amicus* says, because:

> "... Frankfurter and Greene's The Labor Injunction (1930) teaches that where the standards are amorphous the tendency of the District Courts in labor disputes has been to grant preliminary relief with a free hand on the theory that maintenance of the status quo is an absolute value" (Br. p. 8).

Here again, the *amicus* advances an argument that it pressed unsuccessfully in *Boys Market* (Br. note 6 *supra,* pp. 14, 18-21). This Court's response was:

> "The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today. In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups.[19] The result was a large number of sweeping decrees, often issued *ex parte,* drawn on an *ad hoc* basis without regard to any systematic elaboration of national labor policy. ..." 398 U.S., at 250.

"[19] See generally F. Frankfurter & N. Greene, The Labor Injunction (1930)."

And as to the difficulty of the Section 2 First issue, the same argument was made in *Virginian.* As we have already pointed out (Br. p. 50), this Court responded as follows:

> "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U.S., at 550.

Nor can it be contended that Section 2 First questions are any more intricate than other questions of violation of the Railway Labor Act that are regularly decided in strike injunction suits. To see that this is so, one need only read the majority and minority opinions in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), with respect to the question whether a Section 6 notice bears upon a subject of mandatory bargaining under the Act, or the majority and dissenting opinions (by then Circuit Judge Marshall) in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), with respect to the question whether a dispute is "minor" or "major."[8]

(3) A further difficulty with the *amicus'* argument is that, to the extent Section 2 First issues are complex and courts are inclined against unions, the complexity and the bias would be no less in suits to require good faith bargaining—the kind of suits the *amicus* recommends as a substitute for strike injunction suits. The *amicus* recognizes the problem and acknowledges it must show more:

> "The foregoing points, going as they do to considerations of substantive law, would be valid even if this were not a 'strike injunction suit.' We emphasize them because the possibility of such an injunction so exacerbates these problems as to make a qualitative difference." (Br. p. 8)

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[8] On the question whether courts should determine Section 2 First questions, we note also that Congress has directed both the district courts and the courts of appeals to determine a host of complex questions relating to collective bargaining under the Labor Management Relations Act, both where injunctions are involved and where they are not. Labor Management Relations Act §§ 10(e), (f), and (j), 29 U.S.C. §§ 160(e), (f), (j).

The "exacerbation," in *amicus'* view, would result from the temptation that would result from the availability of injunctive relief for the parties "both to structure their actions so as to strengthen their litigating posture, and to litigate with inadequate cause" (Br. p. 8). As to the *amicus'* dark prediction respecting the "structuring" of negotiations, it is not easy to see what evil the *amicus* has in mind. Perhaps both parties would conduct their negotiations with an eye toward giving an appearance, at least, of bargaining in good faith; but while this might cloak statutory violations, the situation would hardly be improved by withholding relief even in those cases where the violation can be proved. And as to *amicus'* assertion that acceptance of our position would produce "a virtual certainty that every unsettled major dispute will be brought to the federal courts on allegations of bad faith bargaining" (Br. p. 8), the answer is that nothing of the sort has happened during the twelve or more years that lower court decisions have confirmed the availability of this avenue.[9]

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[9] Respondent says that the relevant line of decisions began in 1958 (Br. pp. 25-26). We put it earlier (Br. pp. 61-70). But for purposes of testing the *amicus'* prediction, 1958 is quite early enough.

While the fact that during this time only a small number of disputes have "been brought to the federal courts on allegations of bad faith bargaining" makes it unnecessary to speculate about the reasons, one consideration that is doubtless relevant is the fact that good faith bargaining claims are often difficult to prove, together with the fact that in most situations the relief would be merely temporary. A party can, of course, purge itself of bad faith bargaining. See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633, 636 (4th Cir. 1969). The procedures of the Act can, accordingly, be exhausted after a judgment of bad faith bargaining. Thus the situation is unlike that where the dispute is "minor" or where the union's Section 6 notice relates to improper demands. Moreover, since the courts, as the *amicus* observes, cannot compel agreement, the result of the bargaining may be no different after a bad faith bargaining strike injunction than before.

(4) A related argument is that the availability of injunctive relief for Section 2 First violations would "dissipate the pressures for settlement" that would otherwise arise from a "fixed cut off date" for strike-free negotiations (Br. pp. 13-15). In view of the uncertain outcome of litigation of this sort, together with the grave consequences to a railroad of even a brief strike, this assertion is, in our view, baseless as a general matter. The low incidence of such litigation supports our view. Of course, where the union's violation of Section 2 First is palpable and destructive of the possibility of a genuinely negotiated agreement, the availability of a strike injunction might "dissipate the pressures for settlement." But that is exactly as it should be. The other side of it is that, if a strike injunction were *not* available, the "pressures" for good faith bargaining would be "dissipated" whereas the "pressures for settlement" by the carrier would be overwhelming even though the union, instead of bargaining in good faith, has bent its full efforts to exerting those "pressures." And that is exactly as it should *not* be.

(5) The *amicus* attempts to support its contention respecting subversion of collective bargaining by pointing to the facts of the case at bar. But it misapprehends the facts. It is simply not true that petitioner "held back" its "charges . . . like an ace in the hole, until . . . the Union's right to self help had matured" (Br. p. 9). If that were so, presumably the union would have raised an estoppel defense in this equity action. The company, in a letter to the mediator at the start of mediation, explicitly and formally stated its view that the union's actions contravened Section 2 First, while at the same time acknowledging that the matter did not fall within the province of the mediator (A. 197-198; see also A. 80-81). Nor is it true that

"[t]he incidents upon which the Company's claim rests occurred between March 1968 and June 1969 (Br. p. 9). Rather, they continued up until the eve of the suit, as the testimony makes quite plain (A. 47-48, 142-143, 147-150).

(6) The *amicus* says (Br. p. 18) that, as opposed to *Chicago River* and *Boys Market,* a strike injunction based upon a breach of Section 2 First would leave the union without "any reasonable alternative" such as arbitration. But, as we have demonstrated, if strike injunctions are not available, then the company is left without "any reasonable alternative" even though the union has violated the Act. And if the union *has* violated the Act, then there is no reason for it to have an "alternative" other than complying with the Act. If it does comply, then the inhibition upon the strike weapon is different in kind from the absolute bar imposed by *Chicago River.* "Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633, 636 (4th Cir. 1969).[10] Perhaps the *amicus*

[10] The *amicus* says the timing of a strike may be important (Br. p. 12). This is evidently to offset the consideration that, while temporary restraining orders may be granted without full hearing, they may last for no more than 20 days without the consent of the parties. Rule 65(b), Fed. R. Civ. P. Preliminary injunctions, of course, are granted only after a full hearing, and the final hearing may be advanced and consolidated with the hearing on the preliminary injunction. See Rule 65(a), Fed. R. Civ. P. Perhaps the timing of a strike may bear upon its effectiveness in strongly cyclical businesses, or in companies where the unions are weak. But timing is of no practical importance whatever in the railroad industry, where the unions are firmly established and where any strike of any significant duration at any time has a devastating impact upon the carrier.

has in mind again the possibility that courts will err. We have already spoken to that point, and add only the suggestion that the wisdom of bringing judicial remedies into play ought to be tested on the assumption that the courts will correctly apply the law rather than on the assumption that they will not.

(7) Finally, while we have already spoken in general about the unreliability of analogies to the Labor Management Relations Act in Railway Labor Act cases, a few more specific comments about the *amicus'* heavy reliance upon that statute are in order. First, we suggest that if *Boys Markets* means anything in this case, it supports our position. We have already noted that some of the policy arguments advanced here by *amicus* were rejected in *Boys Markets*. But more importantly, in *Boys Markets,* this Court held Norris-LaGuardia inapplicable even though the action of the union did not violate any obligation prescribed by a federal labor law, whereas the question here is whether Norris LaGuardia should bar relief against a violation of what this Court has termed the "heart" of the Railway Labor Act.[11]

Second, insofar as strike injunctions based on bad faith bargaining claims are concerned, it is clear at a minimum that whatever lesson the Labor Management Relations Act teaches does not aid the *amicus*. So respondent evidently views the matter, for it objects that the result for which we contend "would incorporate into Section 2 First . . . the provisions of Sections 8

[11] Moreover, the embarrassments of conflicting state and federal court remedies that led the Court in *Boys Markets* to reconsider *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), would arise in the same measure in cases like the one at bar if Norris-LaGuardia were held applicable.

and 10 of the Labor Management Relations Act notwithstanding the different policies of the two statutes (Br. 31-32).

The central question put by the *amicus* is whether the Congress intended the courts to be free to enforce Section 2 First by way of strike injunctions. The *amicus* concedes implicitly (Br. p. 10), and the respondent explicitly (Br. p. 31), that the Congress provided for the availability of such injunctions under the Labor Management Relations Act notwithstanding Norris-LaGuardia. If any inference is to be drawn, it ought to be that the Congress would not have permitted such injunctions in a statute regulating the broad range of American industry and have forbidden them in an industry singled out for special legislative attention because of the enormous impact of rail strikes upon the public.[12]

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[12] "In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other crucial supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed." *Brotherhood of Railway Clerks* v. *Florida E.C. R.R. Co.*, 384 U.S. 238, 245 (1966).

The *amicus* says that "the normal remedy" under the Labor Management Relations Act is not a strike injunction but an order to bargain in good faith, and that it is "unaware of a single strike injunction based on a failure to bargain in good faith." (Br. p. 10). Our research, which is incomplete because of limitations of time, leave us unclear as to the "normal remedy" in bad faith bargaining situations *where the union is striking.* For in fact the NLRB *has* sought strike injunctions in such situations—and its applications have been successful—in a significant number of cases. See, *e.g.*, *Alpert* v. *International Typographical Union*, 161 F. Supp. 427 (D. Mass. 1958); *NLRB* v. *National Maritime Union*, 175 F. 2d 686, 688 (2d Cir. 1949), *enforcing* 82 NLRB 1365, 24 LRRM 1004 (1949); *Douds* v. *International Longshoremen's Ass'n*, 31 CCH Lab. Cas. ¶ 70, 332,

Finally, the decisions other than *Boys Markets* cited by the *amicus* are of no pertinence here. They set down guidelines for the NLRB to follow in determining bad faith bargaining claims—but this case is not here on the merits. And they stand for the unquestioned principle that neither the NLRB nor the courts may dictate the terms of settlement—but that does not mean, as this Court said in *Virginian,* that "since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." 300 U.S. at 550.

CONCLUSION

For the reasons set forth above, together with those set forth in our opening brief, the judgment of the Court of Appeals should be set aside and the case re-

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p. 92,825 (S.D. N.Y. 1956); *International Typographical Union* v. *NLRB,* 278 F. 2d 6, 12-13, 15 (1st Cir. 1960), *enforcing* 123 NLRB No. 97, 43 LRRM 1538, 1544 (1959) *aff'd in part and rev'd in part,* 365 U.S. 705 (1961); *American Newspaper Publishers Ass'n* v. *NLRB,* 193 F. 2d 782, 806 (7th Cir. 1951), *enforcing* 86 NLRB No. 116, 25 LRRM 1010, 1016 (1949), *aff'd as to other issues,* 345 U.S. 100 (1953); *McLeod* v. *Compressed Air Workers,* 292 F. 2d 358, 359 n. 1 (2d Cir. 1961); *Madden* v. *International Union, UMW,* 79 F. Supp. 616 (D. D.C. 1948); *NLRB* v. *Amalgamated Lithographers,* 309 F. 2d 31 (9th Cir. 1962), *enforcing* 130 NLRB No. 102, 47 LRRM 1374 (1961); *Elliott* v. *Local Union 49, Sheet Metal Workers,* 34 CCH Lab. Cas. ¶ 71, 553 (D. N.M. 1958); *Employing Lithographers* v. *NLRB,* 301 F. 2d 20 (5th Cir. 1962), *enforcing,* 130 NLRB No. 107, 47 LRRM 1380 (1961). Moreover, in cases of broad public importance the federal government can seek a 90-day strike injunction under Section 208 of the LMRA (29 U.S.C. § 178), obviating the need for the NLRB to move under Section 10(j) (29 U.S.C. § 160(j)). At all events, the practices of the NLRB, whatever they may be, are of the most distant relevance to the case at bar.

manded for a determination on the merits of petitioner's claim.

Respectfully submitted,

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